facilities-based IXCs and switchless resellers that depend on wholesale offerings to complete their networks will face higher prices in many parts of the country as a result of this merger. The business segment is also distinguished by demand for "advanced long distance features" such as data transmission services, as well as eligibility for "volume discounts that are unavailable, as a practical matter, to mass market customers." *See MCI/WorldCom*, 13 FCC Rcd at 18040, ¶ 26. The merger would leave many customers demanding such features with substantially diminished choice.

1. The Merger's Anticompetitive Effects in the Long Distance Voice Market

In the nationwide business long distance voice market, the HHI calculation speaks for itself. The merger would give MCI WorldCom/Sprint a 44% share, even greater than AT&T's 32%, with the remaining 24% divided more or less equally among a collection of second-tier carriers.[51] The merger would thus increase the HHI from 2160 to almost 3000, more than *eight* times the increase necessary to raise a presumption of unlawfulness.

2. The Merger's Anticompetitive Effects in the Long Distance Data Market

Voice service is only one part of the larger business interexchange market, and a shrinking part at that. "[T]he trend is clearly toward data-oriented traffic."[52] Thus, the

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[51] Neither the Commission nor individual carriers separately report business long distance revenues. However, the Commission's residential share data, multiplied by the total size of the residential market (extrapolated from AT&T's most recent mid-year earnings report, *see* AT&T, Midyear Report to Our Shareowners, For the Six Months Ended June 30, 1999), reveals each carrier's residential long distance revenues. Subtracting those revenues from the total long distance revenues reported by the Commission yields an approximation of individual business market revenues and shares.

[52] International Data Corp., *ATM and Frame Relay Switching Market: 1998-2003*, at 3 (June 1999) ("*ATM and Frame Relay Switching Market*").

Commission has recognized a market for non-Internet, packet-switched data services.[53] The key products in this market are frame relay, which constituted approximately 81% of the total packet and cell-based switched data revenues in 1998, and ATM, which constituted approximately 6% of those same revenues in 1998.[54] Smaller services are X.25 services and SMDS.

In 1998, revenues from this market stood at $5.5 billion,[55] and it "is outgrowing voice as a percentage of [long distance] revenues 15 to 1." *SBC/Ameritech*, 14 FCC Rcd at 14841, ¶ 298, 14843, ¶ 305.[56] Revenues for frame relay services in the U.S. grew from $3.9 billion in 1998 to

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[53] The Commission endorsed this same definition in *SBC/Ameritech* (14 FCC Rcd at 14841, ¶ 298 (citing J. Grubman, *et al.*, Salomon Smith Barney, Investext Rpt. No. 3384553, *Telecommunications Services: RBOCs – Industry Report* at *4-*5 (Mar. 11, 1999), which refers to enhanced services such as frame relay, ATM. X.25, not ISDN or Switched Data Services)). DOJ has also recognized a distinct data services market. In the course of its review of the Sprint-DT-FT joint venture, it analyzed the market for "telecommunications service" and found that this broad market might encompass distinct product markets, including a market for data telecommunications services, which it recognized as "distinct from voice services in important respects, from the perspective of both consumers and service providers." 60 Fed. Reg. 44,049, 44,060 (1995).

[54] International Data Corp., *U.S. Packet/Cell-Based Services Market Share and Forecast: 1998-2003*, at 1 (Feb. 1999) ("*IDC Data Report*").

[55] *See id.* at 16.

[56] Internet protocol ("IP") services cannot compete with these services today because of inferior quality. *See* R.M. Davis, Schroder & Co. Inc., Investext Rpt. No. 2035668, *Level 3 Communications: Initiating Coverage – Company Report* at *18 (Dec. 28, 1999) ("Today, IP does not have the quality of service (QoS) characteristics of ATM."); International Data Corp., *U.S. Frame Relay Services Market Share and Assessment: 1999-2004*, at 2 (Dec. 1999) ("*U.S. Frame Relay Services*") ("IP VPNs have not yet evolved sufficiently to move into the mission-critical applications space."). In any event, IP technologies will not displace frame relay and ATM even when they do make up the gap in quality. "ATM and frame relay switching offerings are, and will remain, strategic assets for the new integrated datacom/telecom full-service equipment vendors." *ATM and Frame Relay Switching Market* at 7. "IDC does not expect significant wholesale migration from frame relay to IP-based VPNs; rather, hybrid frame-relay/IP-based VPN networks will emerge as many corporate customers use the latter technology to introduce remote access capabilities and new mission-supporting applications to their networks." *U.S. Frame Relay Services* at 15. Indeed, growth in both the ATM and frame relay markets is expected. "AT&T reported that its Frame Relay and ATM business is expected to grow over 60% in 2000, up from 50-55% in 1999. AT&T has also noted that 47% of the expected 100K Frame Relay ports for the year 2000 have already been ordered." C. Stix, SG

$5.7 billion in 1999.[57] ATM services are growing even more rapidly, from revenues of $344 million in 1998 to $737 million in 1999, a growth rate of more than 100%.[58] These data transmission services are unquestionably among the "ever more sophisticated service offerings" demanded by institutional business customers, *MCI/WorldCom*, 13 FCC Rcd at 18045-46, ¶ 34, and this merger would severely restrain competition for such services.

In the data market, "over 85% of large and medium business customer expenditures are for long-haul services." *SBC/Ameritech*, 14 FCC Rcd at 14841, ¶ 298. Not surprisingly, therefore, the Big Three's overwhelming interLATA capacity advantage means that they dominate data services just as they dominate long distance voice. As Table 3 demonstrates, the Big Three dominate the market for data services. They comprise 96% of the ATM market, 93% of the frame relay market, 90% of the X.25 market, and 100% of the SMDS market. Taking together all significant packet/cell-based data services – frame relay, ATM, X.25, and SMDS – the merger would cause a whopping 1169-point increase in the HHI, taking the total to a postmerger level of 3539. That is *eleven* times the increase necessary to create a presumption of unlawfulness under the *Merger Guidelines*.[59]

Cowen Securities Corp., Investext Rpt. No. 2022048, *Visual Networks – Company Report* at *1 (Dec. 7, 1999).

[57] *U.S. Frame Relay Services* at 7.

[58] International Data Corp., *ATM Services Market Share and Assessment: 1999-2004*, at 7-8 (Dec. 1999) ("*ATM Services*").

[59] Professor Gilbert arrives at similar numbers using a report from Frost & Sullivan. He computes a pre-merger HHI of 2013 and a post-merger HHI of 3307 – an increase of 1294 points. Gilbert Decl. ¶ 11.

Table 3. Data Transmission Services Market Shares[1]					
	ATM	**Frame Relay**	**X.25**	**SMDS**	**Total[2]**
Total Market Size (in millions)	$650.4	$4,678.2	$652.2	$31.3	$4,591.8
AT&T Share	35.1%	42.7%	2.8%	n/a	39.6%
MCI WorldCom Share	34.9%	26.3%	5.9%[3]	100%	24.5%
Sprint Share	26.5%	24.1%	81.3%	n/a	29.7%

[1] *See U.S. Frame Relay Services* at 41 (Fig. 20) (frame relay data for 1999); *ATM Services* at 35 (Fig. 18) (ATM data for 1999); *IDC Data Report* at 112-13, 115 (Fig. 66), 140 (X.25, SMDS, and total market share data).
[2] Total market share figures are based on 1998 data from the February 1999 *IDC Data Report*. For this reason, the total market size listed is lower than the sums of the respective markets, which include 1999 data for ATM and frame relay. Using Frost & Sullivan data, Gilbert calculates that, in 1998, MCI WorldCom had about 30% of the packet-switched data services market, AT&T had 24%, and Sprint had 22%. Gilbert Decl. ¶ 11.
[3] WorldCom data unavailable.

And yet, these HHI calculations actually *understate* the merger's impact on the data services market. The RBOCs and GTE are among the most significant other providers of these services. Indeed, they represent five of the eight carriers who follow the Big Three in this market (though the RBOCs and GTE combined have only a small percentage of this market).[60] Absent 271 approval, however, the RBOCs are at a "serious disadvantage . . . in the data market," because in their regions they cannot provide the long-haul service that makes up 85% of the demand for data transmission. *SBC/Ameritech*, 14 FCC Rcd at 14841, ¶ 298. MCI WorldCom, Sprint, and AT&T thus control an overwhelming share of the market for data service, and their next closest "competitors" are legally prohibited from truly competing.

That absence of competition will exact a high cost. The Commission has stressed that it "must continue to ensure competition in the provision of advanced services by multiple providers." *Id.* at 14796, ¶ 187. The merger will cut off competition in the data transmission market at the knees, substantially harming the market for these "ever more sophisticated service offerings" demanded by the larger business segment. *MCI/WorldCom*, 13 FCC Rcd at 18045-46, ¶ 34.

[60] *See IDC Data Report* at 17.

Moreover, as with the residential market, the market concentration in both voice and data services – however noteworthy and alarming – still does not capture the full anticompetitive threat posed by the merger. As Sprint Chairman William Esrey told Congress in 1998, "[i]n a technologically dynamic industry such as telecommunications, rivalry in innovation is extremely important in promoting economic efficiency."[61] For the past decade and a half, MCI and Sprint have competed to provide the "ever more sophisticated service offerings" necessary to compete in the larger business segment. *See* Table 4. With the elimination of any rivalry between MCI WorldCom and Sprint, this needed engine of innovation in the long distance business will be shut off.

[61] Statement of William J. Esrey, Chairman, Sprint Corp., Before the Antitrust, Business Rights, and Competition Subcomm. of the Senate Comm. on the Judiciary, Oversight Hearing on Consolidation in the Telecommunications Industry, 105th Cong., 2d Sess. (Sept. 14, 1998), available at 1998 WL 767378.

Table 4. MCI and Sprint Voice and Data Service Innovations		
Year	**MCI and Sprint Voice and Data Service Innovations, 1982-1999**	**Company**
1982	First long distance competitor of AT&T with plans for major fiber optic deployment[1]	MCI
1983	First long distance competitor of AT&T to extend its network into a foreign country[2]	MCI
1986	First nationwide alternative to AT&T's 800 Service[3]	MCI
1986	First transcontinental fiber optic telephone and video circuits[4]	US Sprint
1988	First U.S. long distance company to offer a dedicated network for the domestic and international transmission of facsimile messages[5]	MCI
1988	First long distance carrier to install Signaling System 7 throughout its network[6]	US Sprint
1989	First transatlantic fiber optic phone call[7]	US Sprint
1990	First company to provide packet- and circuit-switched voice and data services over the same T1 access facility[8]	US Sprint
1991	First nationwide public frame relay service[9]	Sprint
1992	First long distance company to introduce a Simple Network Management Protocol-based ("SNMP") frame relay network management service[10]	MCI
1993	First U.S. long distance carrier to offer a new high-speed, transatlantic circuit-switched bandwidth-on-demand data service[11]	MCI
1993	First nationwide ATM service[12]	Sprint
1995	First Frame Relay-to-Asynchronous Transfer Mode interworking service[13]	Sprint
	First carrier committed to deploying Dense Wave Division Multiplexing in nearly 100% of its fiber miles[14]	Sprint
1999	Remote Office: Dial-on-demand service that enables corporations to connect remote office, branch locations, and outlying sales offices through a single local dial-up connection – a "unique offering in today's marketplace"[15]	MCI WorldCom
1999	Circuit View and Circuit View Plus: Advanced network management and reporting service for frame relay customers[16]	MCI WorldCom
1999	First major telecommunications company to offer streaming, Internet-based video conferencing services[17]	Sprint

[1] N. Black, *MCI to Boost Capacity of N.Y.-D.C. Phone Network*, Assoc. Press, Dec. 1, 1982. [2] N. Black, *MCI Plans Long-Distance Service to Canada Starting Wednesday*, Assoc. Press, Apr. 5, 1983. [3] *MCIC To Offer 800 Service*, Bus. Wire, Sept. 10, 1986. [4] *US Sprint Begins Transcontinental Fiber-Optic Phone Service*, Bus. Wire, Dec. 31, 1986. [5] *MCI Communications Offers Dedicated Fax Line Network*, PR Newswire, Nov. 3, 1988. [6] Sprint, *Landmarks in Sprint History*, <http://www.sprint.com/sprint/overview/milestones.html> (visited Feb. 16, 2000); *US Sprint Implements Signaling System Seven*, Bus. Wire, Nov. 22, 1988.

[7] Sprint, *Landmarks in Sprint History*, <http://www.sprint.com/sprint/overview/milestones.html> (visited Feb. 16, 2000). [8] *US Sprint Announces Access to SprintNet for T1 Customers*, Bus. Wire, May 22, 1990. [9] Sprint, *Landmarks in Sprint History*, <http://www.sprint.com/sprint/overview/milestones.html>; *Sprint Certifies First LAN Routers for Frame Relay Service*, PR Newswire, Oct. 1, 1991. [10] *MCI Introduces First Carrier Frame Relay Standards-Based Network Management Service*, PR Newswire, Sept. 21, 1992. [11] *MCI to Market New International Switchband Service for High-Speed Bandwidth On-Demand*, PR Newswire, Feb. 18, 1993. [12] *Sprint Reports Record Quarterly and Annual Revenues and Income from Continuing Operations*, PR Newswire, Feb. 2, 1994. [13] *Sprint Announces New Program To Upgrade Data Networks Simply and Cost-Effectively*, PR Newswire, Sept. 28, 1995. [14] *Sprint Unveils Revolutionary Network*, PR Newswire, June 2, 1998. [15] MCI WorldCom Press Release, *MCI WorldCom Advanced Networks Launches New Dial-on-Demand Service*, Feb. 17, 1999, <http://www.wcom.com/about_the_company/press_releases/archive/1999/> (visited Feb. 16, 2000) (statement of Dennis Brouwer, Vice President of Product Marketing, MCI WorldCom Advanced Networks). [16] MCI WorldCom Press Release, *MCI WorldCom Introduces Circuit View and Circuit View Plus Frame Relay for Business Customers*, Apr. 12, 1999, <http://www.wcom.com/about_the_company/press_releases/archive/1999/> (visited Feb. 16, 2000). [17] Sprint Press Release, *Sprint Makes Your Desktop a Window to the Future*, Oct. 6, 1999, <http://www.sprint.com/Stemp/press/releases/199910/index.html> (visited Feb. 16, 2000).

3. New Entry Is No Tonic for the Merger's Adverse Effects Among Larger Business Customers

The parties' claims about new entry are no more convincing in the larger business segment than in the mass market. To be sure, when an RBOC enters long distance, it will do so

in both the mass market and the larger business segment. But, as discussed above, the timing of that entry is not sufficiently certain to allay concerns about excessive market concentration.

Nor can the parties rely on "new" capacity of second-tier carriers in the larger business market. Though perhaps less wedded than residential customers to the AT&T, MCI, and Sprint brands, large businesses "are served under individual contracts and marketed through direct sales" contacts. *Bell Atlantic/NYNEX*, 12 FCC Rcd at 20016, ¶ 53. The second-tier carriers cannot readily develop these direct contacts, for they lack the retail sales forces necessary to compete. Whereas AT&T has a sales force of almost 10,000 people[62] and Sprint a legion of 7000,[63] many of the second-tier carriers operate with only 300-550 sales employees.[64] As MCI WorldCom's own vice chairman put it when speaking to the purported threat posed by second-tier carriers such as Qwest and Level 3, "[t]hese companies . . . [are] building networks with a lot of capacity, without having much of a retail sales force. . . . If they don't have a sales force to sell retail business customers, I don't see how they threaten MCI WorldCom."[65]

Larger business customers require a truly nationwide presence, without which these second-tier carriers will never compete effectively against the Big Three. As one industry analyst has noted, "CLECs that target Fortune 500 companies will tend to have national

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[62] E. Strumingher, *et al.*, PaineWebber, Inc., Investext Rpt. No. 2815784, *MCI WorldCom Inc. – Company Report* at *2 (Dec. 21, 1998).

[63] D.H. Rimer, Hambrecht & Quist Inc., Investext Rpt. No. 2860628, *Critical Path, Inc.: Initiating Coverage – Company Report* at *2 (Apr. 26, 1999).

[64] M. Kulick, *et al.*, Merrill Lynch Capital Markets, Investext Rpt. No. 2764946, *Frontier Corp. – Company Report* at *2 (Nov. 12, 1998) (Frontier has a 550-person sales force); D.S. Kunstler, Ladenburg, Thalmann & Co., Investext Rpt. No. 2866298, *Level 3 Communications: Initiating Coverage – Company Report* at *3 (May 21, 1999) ("Level 3's expansion schedule includes having 300-400 sales people in 27 U.S. and five European markets at the end of 1999, versus 17 markets and 200 sales people in 15 U.S. and two European cities in service at the start of 1999.").

strategies in order to provide seamless nationwide services to all of its customers' sites."[66] Carriers themselves acknowledge that "providing nationwide coverage is of significant importance to large business customers."[67] Because of the importance of ubiquity, analysts are quick to note that even the RBOCs are at a disadvantage because large business customers "are national if not multinational in scope, and price is clearly not the issue, as they all use customized private networks from AT&T, MCI or Sprint that are basically priced right on top of long run incremental costs."[68] RBOCs traditionally "do not have features such as multi-location billing, nationwide and global customer service personnel, systems support platforms on a nationwide and global basis, all of which are necessary items for successfully competing for the business of large corporate users."[69] AT&T itself boasts that its customers need "end-to-end global services."[70]

Only AT&T, MCI WorldCom, and Sprint have ubiquitous nationwide coverage. All other IXCs – retail and wholesale, including the RBOCs – must rely on one of these three providers to deliver traffic to regions where their networks do not reach. Thus, as noted above, in some parts of the country, the number of wholesale providers will drop from three to two. Indeed, nearly 20% of the population will have only two or three remaining wholesale

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[65] Kate Gerwig, *Johnny Been Good – MCI WorldCom's Vice Chairman Won't Let His Company Play Second Fiddle to Anyone – Especially AT&T*, tele.com (May 17, 1999).

[66] E.G. Henderson, Duff & Phelps Credit Rating Co., Investext Rpt. No. 2988183, *Telecom Services Update – Industry Report* at *9 (Nov. 9, 1999).

[67] W.T. Scott, *et al.*, Furman Selz LLC, Investext Rpt. No. 2647619, *Electric Lightwave Inc. – Company Report* at *11 (Mar. 12, 1998).

[68] J.B. Grubman, *et al.*, Salomon Brothers Inc., Investext Rpt. No. 1679303, *Regional Bell Operating Companies – Industry Report* at *10 (Jan. 1, 1996).

[69] *Id.*

[70] AT&T, *1998 Annual Report* at 4.

competitors after the merger.[71] Thus, the wholesale market, which is a critical pathway for second-tier carriers to compete in the nationwide long distance business market, will be controlled by only two carriers in many parts of the country.

In addition, the business customer segment is based on demand for advanced services. A few second-tier carriers can and do offer some advanced services, and that makes them relevant to the larger business segment. According to the Commission, IXC, Cable & Wireless, and Frontier each has "the capabilities to have a significant impact on competition for larger business customers," and "[e]ach . . . markets its ability to provide at least one advance feature such as VPN and E800 features." *MCI/WorldCom*, 13 FCC Rcd at 18046, ¶ 34. However, none of these carriers is a particularly serious player in the market for data services. Cable & Wireless's share of 0.5% barely edges out Frontier at 0.3%, and IXC does not even rate a mention in a leading industry report.[72] Absent a viable data service offering, it is difficult to see how these carriers can compete in the larger business market.

Moreover, those carriers that do offer the advanced services necessary to compete for larger business customers are already – and, in view of a recent Commission order on access charges, increasingly will be – operating at a disadvantage to the Big Three. Although the IXCs have a wide range of options for obtaining access to their customers in more populated areas, smaller carriers are particularly disadvantaged in less populated rural areas. Most institutional customers demand private line service, requiring the long distance carrier to pay for special

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[71] Switchless resellers, which target business customers, will be especially hard-hit because Sprint and MCI WorldCom have been the facilities-based wholesalers that focus most intently on serving the switchless business segment. Indeed, the vast majority of the reseller industry's successful pioneers rely on Sprint Wholesale. *See* Atlantic-ACM, *Wholesale Long Distance: Carrier Report Card 2000-2004* (Feb. 2000). Thus, the merger will eliminate not only one of the two largest wholesale providers but also one of the two largest supporters of switchless resale.

[72] *See IDC Data Report* at 17.

access, which is typically charged at distance-sensitive rates.[73] Thus, the further the distance between the IXC's POP and the customer, the higher the IXC's costs in serving that customer. As described above, AT&T, MCI WorldCom, and Sprint have far more POPs, in far more locations, than any other carrier. Hausman Decl. ¶ 37 & Table 2. While those second-tier carriers that offer advanced services may be somewhat competitive in the larger business market in areas near their POPs, they are woefully behind elsewhere.

"Elsewhere" describes much of the country. Not only do the second-tier carriers have far fewer POPs than the Big Three, they serve a disproportionately high percentage of the population with those POPs. *Id.* The inference, therefore, is that second-tier POPs are located in urban areas, leaving suburban and rural areas underserved.

The second-tier carriers' relative disadvantage to the Big Three will increase over time. As the access market becomes more competitive in the wake of the *Fifth Access Charge Reform Order,* released August 27, 1999, rates increasingly will reflect their true costs. Costs are lower in areas with high population densities, so the second-tier carriers' disadvantage in less populated areas will increase. Thus, the cost advantages enjoyed by the Big Three due to their ubiquity will only be enhanced as the access market becomes more competitive.

II. THE MERGER WILL LIMIT COMPETITION IN THE INTERNET BACKBONE SERVICES MARKET

"The Internet is an interconnected network of packet-switched networks. There are three classes of participants in the Internet: end users, Internet service providers (ISPs), and Internet

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[73] *See* Fifth Report and Order and Further Notice of Proposed Rulemaking, *Access Charge Reform*, CC Docket Nos. 96-262 *et al.*, FCC 99-206, ¶ 10 (rel. Aug. 27, 1999) ("*Fifth Access Charge Reform Order*") (charges for special access include channel mileage charges, which recover the costs of interoffice facilities between the serving wire center and the LEC end office serving the end user); *see also* Report and Order, *Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Virtual Collocation for Special Access and Switched Transport*, 10 FCC Rcd 6375 (1995) (channel mileage charges are distance-sensitive).

backbone providers (IBPs). End users send and receive information; ISPs allow end users to access Internet backbone networks; and IBPs route traffic between ISPs and interconnect with other IBPs." *MCI/WorldCom*, 13 FCC Rcd at 18104-05, ¶ 143 (footnotes omitted). Although the Applicants now attempt to combine Internet backbone services and Internet access services into a single market,[74] the Commission has already rejected this approach. The Commission recognizes that "Internet backbone services, which we define to be the transporting and routing of packets between and among ISPs and regional backbone networks, constitut[e] a separate relevant product market." *Id.* at 18106-07, ¶ 148. And Sprint has elsewhere acknowledged that "[c]ore Internet backbone services comprise a relevant antitrust market."[75]

MCI WorldCom and Sprint own the two largest of the handful of Internet backbones. Combined, the companies would control 50% or more of Internet backbone revenues, as well as a dominant share of ISP connections. Due to the structure of the Internet industry, this dominant share would give MCI WorldCom/Sprint the incentive and ability to lessen competition in this increasingly vital area. Moreover, because of this structure as well as MCI WorldCom's recent history, it is likely that mere divestiture of Sprint's backbone would not adequately protect competition.

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[74] Indeed, in the Applicants' attempt to blur the clear line between ISPs and IBPs, they misquote the FCC as discussing ISPs when, in fact, the Commission was discussing IBPs. *See* Supplemental Internet Submission at 4 n.5, *Applications of Sprint Corp. and MCI WorldCom, Inc., for Consent to Transfer Control of Corporations Holding Commission Licenses and Authorizations Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 1, 21, 24, 25, 63, 73, 78, 90, and 101*, CC Docket No. 99-333 (FCC filed Jan. 14, 2000) ("Internet Submission") (misquoting ¶ 146 of the *MCI/WorldCom Order*).

[75] Comments of Sprint Corp. at 8, *Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom, Inc.*, CC Docket No. 97-211 (FCC filed Mar. 13, 1998) ("*Sprint MCI/WorldCom Comments*").

A. The Combined Entity Would Dominate the Internet Backbone Services Market

The proposed MCI WorldCom/Sprint would be by far the largest provider of Internet backbone services. Industry estimates put MCI WorldCom's share of backbone revenues in the range of 35-45%,[76] and Sprint's between 10% and 19%.[77] Measured by ISP connections, the merged company would control between 43% and 70% of the market.[78] No other provider would even come close to matching that size. Measured by ISP connections, the merged company's share would be as large as the next 11 backbone providers combined, with the next largest (Intermedia) at a comparatively paltry 8%. Even using conservative estimates of market share based on ISP connections – 33% for MCI WorldCom and 10% for Sprint – the merger would result in an HHI increase of 860 points. Hausman Decl. ¶ 52.

This dramatic size advantage would provide MCI WorldCom/Sprint with the ability and incentive adversely to affect competition in the backbone market. Size is crucial in this market. First, only the largest backbone providers have sufficient scale to enter into complementary "peering" arrangements, through which some networks agree to carry one another's traffic

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[76] The estimate is from the European Commission's review of nonpublic data in the course of reviewing the MCI/WorldCom merger. *See* Commission Decision, *WorldCom/MCI*, Case IV/M.1069, ¶ 114 (Commission of the European Communities July 8, 1998) ("*EC WorldCom/MCI Order*"). The European Commission estimated WorldCom's revenue share as between 35% and 45%. The Applicants state that MCI WorldCom's revenue share is 38%. Internet Submission at Attachment E.

[77] The lower estimate is from the *EC WorldCom/MCI Order*, which states that Sprint and GTE's share was a combined 15-25%. It then pointed out that GTE was "about half the size of Sprint." *Id.* ¶ 114. The higher estimate is derived from International Data Corp., *Internet Service Provider Market Review and Forecast: 1998-2003*, at 29-30 (1998) (in 1997, Sprint had 19% of wholesale Internet backbone service revenues).

[78] *See* Yankee Group, *MCI WorldCom and Sprint Merger: Telecom Fusion – The World Is Getting Smaller* 11 (Oct. 15, 1999) (MCI WorldCom and Sprint have more than 4000 ISP connections and represent between 60% and 70% of the backbone market); *Boardwatch Magazine's Directory of ISPs*, at 4 (11th ed. 1999) (MCI WorldCom has 33% of ISP connections; Sprint has 10%).

without charge. As MCI WorldCom and Sprint themselves put it in their supplemental submission on Internet issues, such peering agreements make no sense unless "each [provider] provides roughly equivalent value to the other."[79] And, as Sprint acknowledged as recently as 1998, the alternative interconnection arrangement – the imposition of transit fees on the traffic of the other provider – allows a dominant provider of backbone service to "make competition difficult, or even impossible," by controlling market entry and raising the costs of its smaller rivals.[80]

Second, the size of a backbone is critical because a backbone's value to its users lies in its ability to provide connectivity to the entire Internet. Again using Sprint's words, where one backbone achieves a substantial size advantage over its rivals, it necessarily "reduces the value of, and therefore the demand for, the rivals' products."[81] At some point, "the market may 'tip,' with customers abandoning the rivals altogether because their networks are too small to be viable."[82] In addition, because smaller networks rely more heavily on large networks for connectivity than vice versa, it is the customers of the smaller network that will suffer if the

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[79] Internet Submission at 18.

[80] *Sprint MCI/WorldCom Comments* at 4; *see generally MCI/WorldCom*, 13 FCC Rcd at 18108-09, ¶ 150; *EC WorldCom/MCI Order* ¶ 94.

[81] *See* Stanley M. Besen, *et al.*, *An Economic Analysis of the Impact of the WorldCom-MCI Merger on the Provision of Internet Backbone Services* 10 (Apr. 7, 1998) ("*Sprint IBP Paper*") (enclosed with Ex Parte Letter from Michael B. Fingerhut, Sprint Corp., to Magalie Salas, FCC, CC Docket No. 97-211 (FCC filed June 1, 1998)); *see generally, e.g., United States v. Microsoft Corp.*, Nos. CIV. A. 98-1232 & 98-1233, 1998-2 Trade Cas. (CCH) ¶ 72,261, 1998 WL 614485, at *4 (D.D.C. Sept. 14, 1998); William J. Baumol & J. Gregory Sidak, *Toward Competition in Local Telephony* 109-10 (1994) ("an individual consumer's demand for use of the network increases with the number of other users on the network"); D. Balto, *Networks and Exclusivity: Antitrust Analysis To Promote Network Competition*, 7 Geo. Mason U.L. Rev. 523 (1999).

[82] *Sprint IBP Paper* at 10.

larger network degrades or fails to upgrade the connection between the two.[83] Indeed, since the dominant backbone relies on the smaller competitor for a small portion of the connection requirements of the dominant provider's users, the customers of the larger network may scarcely notice such service degradation. Due to size and "quality differential[s]," therefore, larger backbone providers such as MCI WorldCom are "well placed to persuade any prospective new customers . . . to ignore the offerings of its rivals."[84]

B. This Merger Is at Least as Problematic as the MCI/WorldCom Merger

MCI and WorldCom last attempted to consolidate the two leading providers of Internet backbone services in 1998, when they merged. In that case, this Commission, the Department of Justice, and the European Commission all recognized that the merged entity would have been able to use its control over peering relationships to "increase the costs of interconnection . . . which would ultimately increase end users' prices."[85] In addition, the combined MCI WorldCom "would degrade the quality of interconnection with rivals in order to induce their rivals' customers to migrate to [MCI WorldCom's] network."[86] Commenting on the MCI/WorldCom merger, Sprint noted that the union of MCI's and WorldCom's backbones would have created a "new Internet entity," the "sheer size and scope" of which would have "provid[ed] it with . . . market power that [could] be used to reduce competition in the core Internet backbone market."[87]

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[83] *See SBC/Ameritech*, 14 FCC Rcd at 14796-77, ¶ 189 ("[a]ccording to Sprint," the increased size of SBC/Ameritech would "increase[] incentives to discriminate against [smaller] competing carriers that depend on access" to services such as interconnection).

[84] *See EC WorldCom/MCI Order* ¶¶ 122-123; *see also id.* ¶¶ 63-66.

[85] *See id.* ¶¶ 114-117; *MCI/WorldCom*, 13 FCC Rcd at 18107-08, ¶ 149, 18111-12, ¶ 152.

[86] *EC WorldCom/MCI Order* ¶¶ 114-117; *MCI/WorldCom*, 13 FCC Rcd at 18108, ¶ 149.

[87] *Sprint MCI/WorldCom Comments* at 2.

It is difficult to see how this merger can be distinguished. Like the last proposal, this transaction would give MCI WorldCom approximately one-half of the market, if not more, and there is nothing to suggest that the market is less susceptible to a single dominant provider than it was a year and a half ago. And the Applicants have made no attempt to demonstrate that there are efficiencies to be gained from this merger in Internet services that would in any way offset the undeniable competitive harm that will result in this market.[88]

C. Divestiture Would Not Be a Sufficient Remedy

In view of the anticompetitive effects that the merger would produce in Internet backbone services, it is surprising that the Applicants do not propose a concrete solution to remedy the anticompetitive effects. After all, this Commission, the Department of Justice, and the European Commission all allowed MCI and WorldCom to merge only upon the condition that MCI divest its backbone business.[89] Although it is clear that the Applicants anticipate that divestiture of one of their Internet businesses is a possible condition of this merger,[90] their supplemental filing fails to state which backbone would be divested and under what circumstances. The Applicants'

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[88] *See infra* Part III.

[89] *See EC WorldCom/MCI Order* ¶ 144; *MCI/WorldCom*, 13 FCC Rcd at 18103-04, ¶ 142; Department of Justice Press Release, *Justice Department Clears WorldCom/MCI Merger After MCI Agrees to Sell Its Internet Business*, July 15, 1998, at 1-2.

[90] *See MCI WorldCom CEO Bernard Ebbers and Sprint CEO William Esrey Discuss Their Companies' Merger Plans*, CNBC News Transcripts, Oct. 5, 1999 (quoting Sprint Chairman William Esrey as stating, in response to a question regarding divestiture: "I think . . . backbone assets are definitely an issue. And we've been very up front, saying that – that we understand that."); T. Sickinger, *Sprint Deal Could Win Official OK, Esrey Says*, Kansas City Star, Oct. 2, 1999, at A1 ("'There may be some Internet assets – the extent of Internet backbone that Sprint has and WorldCom has together – that you would probably have a divestiture there. That would not be a big deal in the whole scheme of things.'") (quoting Chairman Esrey); M. Greczyn, *MCI WorldCom's Ebbers Praises Bell Atlantic Sec. 271 Progress*, Communications Daily, Nov. 16, 1999, at 3 (describing MCI WorldCom Chief Executive Bernard Ebbers's statement that MCI WorldCom "had received several calls from companies expressing interest in Internet backbone divestitures that company may have to make to meet regulatory restrictions on overlapping assets with Sprint").

failure to provide any details about divestiture may be due to the fact that, under the circumstances presented here, a divestiture would be an inadequate remedy except under the most rigid conditions and supervision.

The purchaser of either MCI WorldCom's or Sprint's backbone would be unlikely to match the current performance of the divested network in the Internet services area, particularly the purchaser of the smaller Sprint backbone. For example, if Sprint's backbone is the one divested, the purchaser will operate at a disadvantage from the outset because it will lack the same relationship with Global One and its partners that Sprint currently relies upon for Internet infrastructure outside of the United States.[91] More generally, the success of each company's Internet service offerings turns in large part upon the extent to which those offerings are integrated with the company's other assets. MCI WorldCom's and Sprint's customers do not purchase backbone services standing alone. They buy a package of voice, data, fax, and other communications services. MCI WorldCom's Smart Bandwidth service, for example, is marketed as "ideal for data customers who want to integrate voice and data traffic over the same access facilities, and who want better control over their bandwidth."[92] Sprint similarly places an emphasis on integrated offerings: "The 'I' in [Sprint] ION stands for integrated. ION would not be possible without the black box that [Sprint] call[s] the integrated services hub . . . the device that integrates all of the [Sprint's] customers' various traffic streams; local and long distance

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[91] *See, e.g.,* Internet Submission at 7 n.10 (admitting that Sprint relies on Global One and Global One partners for Internet infrastructure outside of the United States).

[92] MCI WorldCom Press Release, *MCI WorldCom Introduces Intelligent Bandwidth Services for High-Speed Data,* Jan. 25, 2000.

voice, LAN, frame relay, Internet, intranet, extranet, ATM, fax, and video into a single, high-speed data stream."[93]

Thus, MCI WorldCom/Sprint would not be divesting backbone customers with the backbone. Rather, MCI WorldCom/Sprint would retain "hooks" into the customer base of the divested company, making it less likely that the purchaser of the backbone would be able to maintain market share. Sprint itself has acknowledged the importance of such continuing relationships. In the MCI/WorldCom proceeding, Sprint pointed out that only the "complete divestiture" of an Internet business can "maintain the competitive balance," and it warned that such a complete divestiture is difficult to effectuate, because "most of [the divested] ISP customers [would] continue to obtain a package of . . . communications services from" the divesting firm.[94]

Divestiture of Sprint's network in particular is also likely to be an insufficient remedy because of a dominant Internet backbone provider's ability to degrade the connectivity of smaller Internet backbone networks. Large ISPs and other large customers use a practice called "multihoming" as insurance against IBP network outages and other service problems. With multihoming, a customer buys transit from more than one IBP, so that the customer can easily switch traffic from one network to another in case of network problems. As Professor Hausman explains, multihoming increases the incentive of the dominant IBP to degrade connectivity with the divested network because customers that use multihoming will be able to compare the quality differences between the larger and smaller IBP networks. Hausman Decl. ¶ 56. The ISP will then switch more traffic to the larger IBP when it discovers that the divested IBP has "inferior"

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[93] Sprint, *Visitor's Center*, <http://www.sprintbiz.com/experience/visit_center/press.html> (Chairman William Esrey, audio clip, *The I,O,N in ION*).

[94] *Sprint MCI/WorldCom Comments* at 5, 9-10 (FCC filed June 11, 1998).

connectivity. *Id.* In other words, the ISP will buy more circuits from the large network at the expense of the smaller network.

Although the Applicants do not state which backbone would be divested – or, indeed, mention divestiture at all – presumably it would be Sprint's, the smaller of the two.[95] Recent history vividly demonstrates the peril associated with allowing these parties to cast off the smaller backbone prior to merging. When MCI did exactly that just over a year ago – divesting its backbone to Cable & Wireless, purportedly to preserve the status quo existing before the MCI/WorldCom merger – it allegedly did so in such a manner as to "threaten to impair Cable & Wireless's competitiveness."[96] And, since purchasing MCI's Internet business, Cable & Wireless has labored to keep pace with the growth of the Internet backbone industry. In the fall of 1998, MCI had 28% of all ISP connections. By the summer of 1999, that same business, though now in the hands of Cable & Wireless, had only 6%.[97] Cable & Wireless has specifically cited the "highly integrated" nature of MCI's Internet business as one of the reasons that divestiture failed in that merger.[98] MCI WorldCom and Sprint offer no reason to think that a divestiture of either company's backbone would be any more effective than the prior MCI backbone divestiture in preserving Internet competition.

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[95] *See* Internet Submission at 23 ("MCI WorldCom and Sprint have already committed to work cooperatively with policymakers to address and resolve concerns they may have with respect to *adding Sprint's Internet backbone business to MCI WorldCom's.*") (emphasis added).

[96] *See* Testimony of Mike McTighe, CEO, Cable & Wireless, Global Operations, Before the Senate Comm. on Commerce, Science and Transportation, Hearings on Mergers in the Communications Industry, 106th Cong., 1st Sess. (Nov. 8, 1999) ("McTighe Testimony"), available at 1999 WL 1022955 (MCI WorldCom divested MCI's Internet business in such a way as to "threaten to impair Cable & Wireless's competitiveness"); *see also* Complaint ¶¶ 37-40, *Cable & Wireless USA, Inc. v. MCI WorldCom, Inc.*, Civil Action No. 99-204 (D. Del. filed Mar. 31, 1999).

[97] *Compare Boardwatch Magazine's Directory of ISPs* (10th ed. 1998) *with Boardwatch Magazine's Directory of ISPs* (11th ed. 1999).

III. MCI WORLDCOM AND SPRINT FAIL TO JUSTIFY THEIR PROPOSED MERGER WITH PUBLIC-INTEREST BENEFITS THAT OUTWEIGH THE COMPETITIVE HARMS

The merger may be approved only if MCI WorldCom and Sprint demonstrate that their union will result in public-interest benefits that outweigh the competitive harms. These benefits must be "achievable only as a result of the merger," "sufficiently likely and verifiable," and "not deemed the result of anti-competitive reductions in output or increases in price." *SBC/Ameritech*, 14 FCC Rcd at 14825, ¶ 255. Moreover, in view of the extensive competitive threat that the merger poses in the long distance, packet switched data services, and Internet backbone markets, MCI WorldCom and Sprint are tasked with "demonstrat[ing]" benefits with "a higher degree of magnitude and likelihood than [the Commission] would otherwise demand." *Id.* ¶ 256. MCI WorldCom's and Sprint's claimed efficiencies do not even come close to meeting these standards.

A. The Merger Will Decrease, Not Increase, Competition in the Local Exchange

A linchpin of the merger proposal is the assertion that the merger will enable the parties to compete more efficiently in the local exchange. It is the addition of new local service offerings that the parties say will allow them to provide "all distance" service. Application at 19. But it can hardly be claimed that increased local competition is "achievable only as a result of the merger." *SBC/Ameritech*, 14 FCC Rcd at 14825, ¶ 255. Both MCI WorldCom and Sprint are today among "the most significant participants in the mass market for local exchange and exchange access services." *MCI/WorldCom*, 13 FCC Rcd at 18122, ¶ 171; *Bell Atlantic/NYNEX*, 12 FCC Rcd at 20032-33, ¶¶ 87-88. Indeed, they directly compete in numerous local service

[98] McTighe Testimony, 1999 WL 1022955.

markets. If anything, under the logic of the Commission's recent precedents, the merger's effect on local competition is a reason to deny the merger.

1. The Merger Would Consolidate an ILEC With an In-Region CLEC

As the nation's sixth largest ILEC, Sprint, like other ILECs, is facing local competition in many of its markets. Much of this competition comes from MCI WorldCom. In its orders reviewing the mergers between SBC and Ameritech and Bell Atlantic and NYNEX, the Commission found competitive harm in the removal of local competition that the Commission expected might emerge.[99] The Applicants themselves have also endorsed the theory that the "elimination of both potential, and even nascent actual, competition" can cause competitive harm.[100] Although SBC continues to question the doctrinal soundness of the Commission's concern with what it deems "actual potential competition," unless the Commission is to reverse course, that logic must be applied here as well. And, under the Commission's standard, the likely competitive harm from this merger is substantially greater than the Commission found in *SBC/Ameritech* and *Bell Atlantic/NYNEX*.

MCI WorldCom and Sprint acknowledge that MCI WorldCom already has obtained collocation in several of Sprint's ILEC central offices. Application at 26. Moreover, as the following map reveals, MCI WorldCom operates as a CLEC in 13 separate MSAs, in 8 states, that overlap with Sprint's incumbent territory. These MSAs are in Florida (Orlando and Tampa), Indiana (Indianapolis), Minnesota (Minneapolis), Missouri (Kansas City), North Carolina (Northampton and Raleigh), Ohio (Cincinnati and Toledo), Texas (Austin, Dallas, and Houston),

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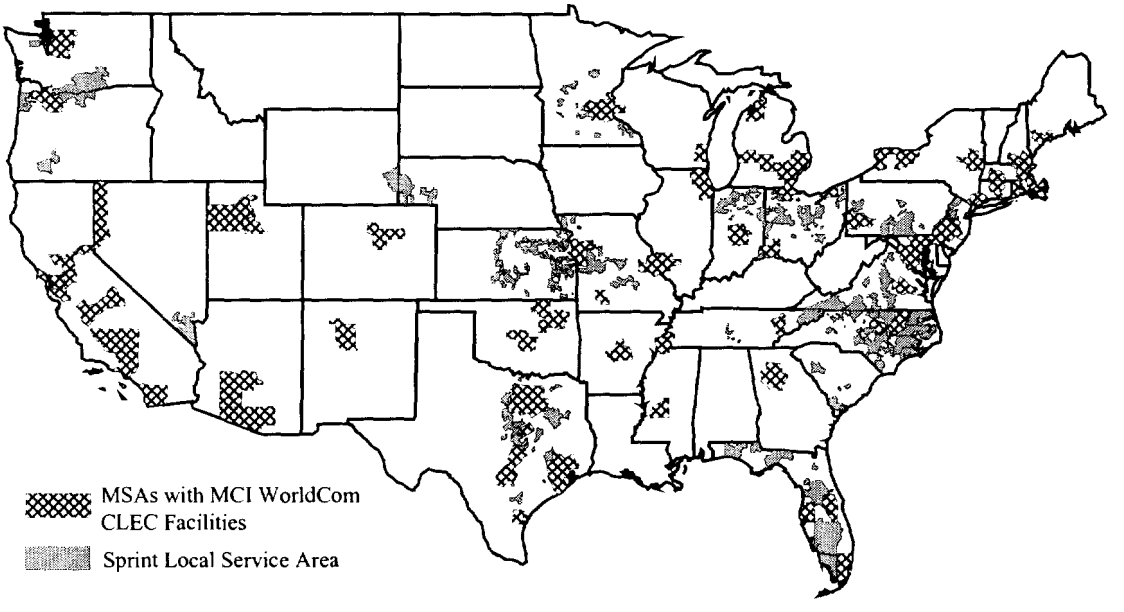
[99] *See SBC/Ameritech*, 14 FCC Rcd at 14757-60, ¶¶ 92-99; *Bell Atlantic/NYNEX*, 12 FCC Rcd at 20039-41, ¶¶ 105-108.

[100] *MCI WorldCom SBC/Ameritech Comments* at v (FCC filed Oct. 15, 1998).

and Virginia (Richmond). The actual, existing local competition represented by these overlaps will be eliminated with the merger.

Sprint Local Service Areas and MCI WorldCom CLEC Facilities



Sources: New Paradigm Resources Group. 1999 Annual CLEC Report, 10th ed. At Chapter 10 - MCI WorldCom (1999); Center for Communications Management Information. U.S. Long-Distance Carrier POP Database. Dec. 1996.

In addition, the relevant precedents reveal the Commission to be concerned about mergers between two parties that provide local service in "adjacent" territories. *Bell Atlantic/NYNEX*, 12 FCC Rcd at 20024, ¶ 69.[101] As noted, SBC continues to question the validity of these concerns. But the theory, to the extent it is valid, would fully apply here. MCI WorldCom provides local exchange service in 9 MSAs directly adjacent to Sprint incumbent territory. These adjacent MSAs are in Florida (Miami), Maryland (Baltimore), Ohio

[101] *See also Bell Atlantic/NYNEX*, 12 FCC Rcd at 20029, ¶ 79; *SBC/Ameritech*, 14 FCC Rcd at 14753, ¶ 85 ("where they are contiguous, SBC or Ameritech can lease or build transport from their existing switches to a newly entered market more readily than other potential local service providers because of proximity to the newly entered market and their understanding of the requirements for local exchange services"); *MCI/WorldCom*, 13 FCC Rcd at 18120, ¶¶ 167-168

(Cleveland), Oregon (Portland), Pennsylvania (Philadelphia and Pittsburgh), Texas (San Antonio and Waco), and Washington (Seattle).

2. Each Party Is Already Capable of Providing Local Service

Notwithstanding the threat to local competition posed by the merger under the Commission's precedent, the Applicants claim that consolidation of their local exchange operations is actually a reason to approve the merger. If this argument has a familiar ring, it is because it is exactly the argument that MCI and WorldCom used to justify their *last* merger. The Commission approved the MCI/WorldCom merger partly on the basis of their claim that the transaction would allow the merged company to become "'the leading local service competitor'" in the country.[102]

In this instance, the Applicants' claim is entirely without merit. MCI WorldCom and Sprint are already proven competitors in the local exchange. As noted, Sprint's ILEC operations serve close to 8 million access lines in markets all across the country. These operations provide a reservoir of expertise as well as a ready base for expansion into an untold number of markets. In addition, as the parties themselves stress, Sprint's mobile assets "'provide unique advantages'" – among them "'a ready customer base'" – for entering local markets. Application at 102 (quoting *SBC/Ameritech*, 14 FCC Rcd at 14754, ¶ 85). For its part, MCI WorldCom's CLEC operations already boast 10,000 route miles, 95 operational switches, 35,000 buildings on

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("in principle, . . . the appropriate relevant geographic market consists of the local areas where [the merging parties'] have [local] facilities").

[102] *MCI/WorldCom*, 13 FCC Rcd at 18132-34, ¶¶ 191-192 (quoting Letter from WorldCom President, Chairman, and CEO Bernard Ebbers and MCI Chairman Bert C. Roberts to FCC Chairman Kennard (Jan. 28, 1998)).

net, and close to a million access lines.[103] These numbers cast great doubt on the contention that MCI WorldCom is unable to enter local markets without Sprint's help. Indeed, the Applicants themselves concede that, "[a]s separate entities, MCI WorldCom and Sprint might both build facilities in many of the same areas to compete" with the incumbent provider and other CLECs.[104]

Table 5. CLECs Serving More Than 500,000 Lines

CLEC	Competitive Access Lines	Competitive Networks (route miles)	Voice Switches (installed)	Buildings Served	States Served
AT&T	1,100,000	13,500	105	32,807	41
MCI WorldCom	925,000	10,000	95	35,000	36
ICG	700,000	4,499	29	7,415	14
McLeodUSA	664,700	9,000	27	950	11
RCN	658,572	3,537	4	n/a	8
WinStar	600,000	n/a	37	8,000	34
Intermedia	500,000	1,249	27	4,390	32

Source: New Paradigm Resources Group, Inc., *CLEC Report 2000*, Ch. 5 at Tables 4, 6, 10 & 12, Ch. 7, at 1-26 (11th ed. 2000) (1999 data).

The parties' rote recitation of alleged local exchange benefits rings especially hollow in light of current CLEC opportunities to enter local markets. Under recent court and FCC decisions, CLECs have access to the "UNE platform" – that is, to all of the existing, combined "unbundled network elements" necessary to provide local service, priced only at their incremental cost, and configured to allow the CLEC to offer local service without itself providing any facilities. The Commission's UNE platform rules – designed "to encourage the rapid introduction of competition in all [local] markets"[105] – were modeled to make feasible the

[103] New Paradigm Resources Group, Inc., *CLEC Report 2000*, Ch. 5 at Tables 4, 6, 10 & 12, Ch. 7, at 1-26 (11th ed. 2000) (1999 data).

[104] *Applicants' California Reply* at 40.

[105] *See* Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 99-238, ¶ 9 (rel. Nov. 5, 1999) ("*UNE Remand Order*").

"strategy [of hybrid resale/facilities-based entry] . . . employed successfully by MCI and Sprint in the interexchange market during the 1970's and 1980's."[106] These rules thus allow companies with far smaller market capitalization than MCI WorldCom or Sprint to penetrate the local exchange. *See SBC/Ameritech*, 14 FCC Rcd at 14831, ¶¶ 274-275 (discussing NEXTLINK, Allegiance Telecom, and WinStar).

MCI WorldCom has stated that the UNE platform is a "vehicle capable today of servicing large numbers of residential customers."[107] And, a mere six months ago, MCI WorldCom boasted to the Commission that it "offer[ed] facilities-based bundled voice and data services in 90-100 cities reaching 70-90% of all business subscriber lines." *Id.* ¶ 274. If, as claimed, MCI WorldCom's last merger allowed it to be *the* leading local service competitor in the country – and if, as claimed, the UNE platform enables MCI WorldCom to "offer mass market services throughout the country"[108] – then the parties cannot credibly argue that they must now buy additional networks, rather than enter on their own, to provide local service.

B. Increased Broadband Competition Is Not "Sufficiently Likely or Verifiable" To Offset the Merger's Competitive Harms, Nor Is it Merger-Specific

MCI WorldCom and Sprint argue that the merger will enable them to provide broadband access via MMDS. The uncertainty surrounding the commercial viability of MMDS makes it a thin reed upon which to attempt to justify this competitively harmful merger. In addition, both

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[106] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15509, ¶ 12 (1996) ("*Local Competition Order*").

[107] Comments of MCI WorldCom, Inc. at 52, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 (FCC filed May 26, 1999); *see also id.* ("MCI WorldCom has launched a mass market product throughout New York State using Bell Atlantic's UNE platform.").

[108] *Id.* at 53.

MCI WorldCom and Sprint have each previously indicated that MMDS will be a commercial reality even absent any alignment between the two carriers. This claimed benefit is therefore neither likely nor merger-specific.

As the parties admit, the "MMDS industry has struggled since its inception," and "[c]ommercial deployment of [important] technology has not yet occurred." Application at 87, 85. Despite booming broadband demand, the number of one-way MMDS subscribers fell by 18% between June 1998 and June 1999.[109] The parties suggest that the merged entity will "jumpstart the development of MMDS technology on a commercial basis,"[110] but they provide little reason to believe that will result from the merger. Indeed, they do not provide concrete examples of where and how the claimed synergies will arise, or even discuss a timetable for when the synergies can be expected. Gilbert Decl. ¶ 31. In fact, barely a month ago, the Commission described MCI WorldCom's and Sprint's respective MMDS plans as "unclear."[111] This is hardly the "sufficiently likely and verifiable" public-interest benefit needed to counter-balance the merger's anticompetitive effects elsewhere. *SBC/Ameritech*, 14 FCC Rcd at 14825, ¶ 255.

Moreover, MCI WorldCom and Sprint fail to explain why this alleged benefit is "achievable only as a result of the merger." *Id.* They allege that, "[i]n order to maximize efficient use of . . . spectrum, . . . a single operator must be able to control a *sufficient* amount of contiguous bandwidth," Application at 86 (emphasis added), but they conspicuously fail to

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[109] *See* Sixth Annual Report, *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 99-230, FCC 99-418, ¶ 87 (rel. Jan. 14, 2000) ("*Video Competition Order*").

[110] Application at 16, *Request of MCI WorldCom, Inc. and Sprint Corp. for Approval to Transfer Control of Sprint Corp. 's California Operating Subsidiaries to MCI WorldCom, Inc.*, Application No. 99-12-012 (Cal. PUC filed Dec. 10, 1999).

explain how much is "sufficient." Certainly, the amount of money each of these companies invested in MMDS before the merger was contemplated would suggest that MCI WorldCom and Sprint each believed they could alone assemble "sufficient" bandwidth to make broadband MMDS commercially viable. Just in 1999, Sprint spent $1.6 billion developing MMDS.[112] It acquired six companies with MMDS spectrum rights and access to 30 million households, about one-third of the United States market.[113] Sprint had plans to roll out broadband using its MMDS spectrum in early 2000. Gilbert Decl. ¶ 32. MCI WorldCom purchased CAI Wireless, which is also majority owner of CS Wireless, and has agreed to acquire Wireless One and Southern Wireless Video.[114] Indeed, since the spring of 1999, Sprint and MCI WorldCom have committed more than $1 billion to acquire almost all of the major wireless cable carriers.[115] The parties' turnabout – a "mere recitation by the Applicants that they will provide some benefit if and only if their license transfer is approved" – cannot justify public-interest harms of the magnitude catalogued above. *SBC/Ameritech*, 14 FCC Rcd at 14829, ¶ 267.

C. Synergies Arising from the Union of SkyTel and Sprint PCS Are Not Merger-Specific, and In Any Event Are Minor

The parties also claim that the merger will give the combined company a national wireless presence. Application at 97. But this claim, too, is insufficient to overcome the competitive threat posed by the merger.

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[111] *Video Competition Order* ¶ 89.

[112] B. Carey, *Telecommunications: Sprint, MCI Advance Fixed Wireless Technology*, New Technology Week, Jan. 18, 2000.

[113] *Id.*

[114] *Video Competition Order* ¶ 89.

[115] S. Schiesel, *Wireless TV Finally Gets Validation*, N.Y. Times, July 19, 1999, at C1.

If the advantage to be gained by this transaction is the marriage of Sprint PCS to MCI WorldCom's assets, MCI WorldCom could purchase Sprint PCS. Such a transaction would provide any synergies that might arise from uniting Sprint PCS with SkyTel, and it would avoid the stark anticompetitive harm that comes from consolidating MCI WorldCom's and Sprint's long distance, Internet, and local assets. Bell Atlantic and NYNEX had a successful joint venture in mobile operations before their companies merged,[116] and Vodafone AirTouch and Bell Atlantic are currently co-owners of PrimeCo PCS, a "premier regional provider of PCS/wireless service."[117]

D. The Claimed "Cost Savings Synergies" Do Not Outweigh the Competitive Harm of this Merger

MCI WorldCom and Sprint claim that their merger will produce "substantial cost savings synergies." Application at 106-10. These savings would have to be substantial indeed to outweigh the competitive harms caused by the merger. Instead, the cost savings and synergies claimed by MCI WorldCom and Sprint would do little to overcome the anticompetitive effects this merger poses. None of the cost savings applies to the Internet backbone or packet-switched data markets. Gilbert Decl. ¶ 26. And even in the markets where the savings are claimed – long distance and wireless, *see* Application at 107 – the savings could be completely offset by a long

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[116] *See* D. Leibowitz, *et al.*, Donaldson, Lufkin & Jenrette Securities, Investext Rpt. No. 1875854, *The Wireless Communications Industry – Industry Report* at *23 (Mar. 7, 1997) ("*Wireless Communications Industry Report*") (ranking Bell Atlantic/NYNEX Mobile second among U.S. cellular operators with 4.4 million subscribers as of year-end 1996).

[117] <http://www.primeco.com/co_overview.html>. *See also* Fourth Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, FCC 99-136, App. B at Tables 4 & 6 (rel. June 24, 1999) (ranking PrimeCo second among PCS providers (13th among mobile telephone operators) with 902,000 subscribers as of year-end 1998); *Wireless Communications Industry Report* at *126 ("PrimeCo has almost completed building out its nationwide footprint in 16 metropolitan statistical areas (MSAs) and has managed to beat rivals Sprint and AT&T to the market. This allows PrimeCo to build brand awareness and capture the initial thrust of customers to PCS.").

distance rate increase as small as 2%, an increase that is likely given the increased concentration from the merger and restrictions on RBOC entry. Gilbert Decl. ¶ 25.

As discussed in more detail below, the synergies claimed by MCI WorldCom and Sprint are illusory in some instances, and overstated in all. They barely place a weight on the scales in favor of the merger, let alone one that outweighs the enormous harms this merger presents.

1. Claims of Diminished Capital Expenditures and Domestic Access Savings Mean Decreased Investment in the Local Exchange

The Application indicates that the merger would result in a reduction of $275 million in local network investment, as compared to separate MCI WorldCom and Sprint operations. Application at 108. The Applicants also predict capital expenditure savings of $1.3 billion based in part on the elimination of "any new construction for local fiber by Sprint no longer necessary in light of MCI WorldCom's local facilities." *Id.* at 110. These savings suggest not more efficient competition, but instead plans to diminish investment in competitive local facilities.

MCI WorldCom and Sprint also contend that the merged company could "economically justify the deployment of additional local facilities more quickly and in more service areas simultaneously *than either company could justify on its own*." *Id.* at 24 (emphasis added). That, however, is not the relevant comparison. The question is whether the merged company would deploy more facilities than *both* companies would, each acting alone. MCI WorldCom's and Sprint's expected savings in capital investment are based on the consolidation, not expansion, of their local service facilities. This savings must be "deemed the result of anti-competitive reductions in output," and is therefore not cognizable under Commission precedent. *SBC/Ameritech*, 14 FCC Rcd at 14825, ¶ 255.

Moreover, even if MCI WorldCom and Sprint would realize some efficiency in aggregating their access traffic, the savings are likely to be slim. In numerous markets, Sprint

can use competitive access providers to reach the end user, and, if it believes it could provide access more efficiently than other LECs, it can use UNEs to become a local service provider.[118]

2. Sprint ION Savings Are Overstated

The claim that MCI WorldCom and Sprint will achieve "ION related savings" because Sprint can share MCI WorldCom's existing collocation space in ILEC central offices is not merger-specific. Application at 109. Under the Commission's new collocation rules, Sprint and MCI WorldCom could share collocation space, including cages, without merging.[119] An incumbent is not allowed to place "unreasonable restriction's on a new entrant's use of a collocation cage, such as limiting the new entrant's ability to contract with other competitive carriers to share the new entrant's collocation cage in a sublease-type arrangement." *Collocation Order* ¶ 41. The incumbent must also "permit each competitive LEC to order UNEs to and provision service from that shared collocation space." *Id.* In other words, any claimed synergies from sharing collocation cages have nothing to do with the merger and must be ignored in the public-interest calculus.[120]

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[118] Under the Commission's Supplemental Order in the *UNE Remand* proceeding, carriers may use combinations of unbundled loop and transport elements to provide exchange access service if the carrier is providing a significant amount of local exchange service. *See* Supplemental Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 99-370, ¶ 5 (rel. Nov. 24, 1999).

[119] *See* First Report and Order and Further Notice of Proposed Rulemaking, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 4761, 4784, ¶ 41 (1999) ("*Collocation Order*").

[120] The Applicants may respond that there would be additional costs, such as security arrangements, associated with sharing space as competitors. But such costs are not so high as to prevent local entry. And, in any event, such a response would highlight the key point: absent the merger, MCI WorldCom and Sprint would be two local competitors, one of which would be lost through the merger.

3. Potential OS/DA Savings Are Marginal at Best

The parties claim that they will enjoy savings on operator services ("OS") and directory assistance ("DA") because Sprint can use MCI WorldCom facilities instead of those of a third-party vendor. These savings are likely non-existent, however, because joint self-provisioning is unlikely to reduce cost. That is because the OS/DA market is already competitive and, therefore, vendors are already charging rates close to marginal cost. The Commission concluded in its *UNE Remand Order* that a "variety of alternative providers of OS/DA offer services at comparable cost and quality to those of the incumbents." *Id.* ¶ 446. Because of the substantial number of competitors, the Commission found "unpersuasive assertions that replication of OS/DA service facilities and functionalities would involve substantial and material cost." *Id.* ¶ 450. The Commission also concluded that self-providing OS/DA would not require a substantial investment because "a requesting carrier can establish one call center or a few regional centers to which it can transport all of the calls on its network and provide OS/DA service nationwide." *Id.* ¶ 451. Thus, any merger-related synergies in OS/DA services would be slight at best.

4. Sales, General, and Administrative Savings Pale in Comparison to the Merger's Harms

The parties claim that the merger will allow for sales, general, and administrative cost savings. Application at 110. As an initial matter, the "savings" the companies will enjoy on sales and marketing are simply the by-product of brand competition ending between MCI WorldCom and Sprint. The huge sums the companies spend to maintain their position in long distance (including dial-around services) can be reduced because the merged entity will be able to choose which of the two leading brands – MCI or Sprint – to support. But this "synergy" does nothing to benefit consumers or competition. To the contrary, interbrand competition is the

"primary concern of antitrust law" – therefore interbrand advertising is a real and valuable form of competition.[121]

Moreover, if the merger gave MCI WorldCom/Sprint a dominant position in a market, such as long distance or data, any general and administrative savings would merely increase the company's profits, not consumer welfare. There is no assurance or likelihood that consumers will enjoy any of the purported benefits. The Commission has dismissed similar claims of cost-savings when it is unclear how the public interest will benefit from them. *SBC/Ameritech*, 14 FCC Rcd at 14849-50, ¶¶ 327-332; Gilbert Decl. ¶¶ 27-28. And, in any event, the vague assertions of general administrative synergies are meaningless compared to the great harms the merger presents.

[121] *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 724-25 (1988) (internal quotation marks omitted).

CONCLUSION

Because the proposed merger of MCI WorldCom and Sprint will harm the public interest, their Application should be denied.

Respectfully submitted,

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